

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, ex rel.
LYNNTOYA WASHINGTON and
MICHAEL T. MAHONEY et al.

Plaintiffs,

v.

EDUCATION MANAGEMENT CORP., et al

Defendants,

Civil Action
No. 07-CV-0461

MEMORANDUM IN SUPPORT OF THE COMMONWEALTH OF KENTUCKY, EX.
REL., JACK CONWAY, ATTORNEY GENERAL'S MOTION TO INTERVENE

I. INTRODUCTION

Intervening Plaintiff, Jack Conway, in his official capacity as Attorney General for the Commonwealth of Kentucky, seeks permissive intervention in the present action for the purpose of seeking recovery of civil penalties and restitution of funds paid by the Kentucky Higher Education Assistance Authority, an agency of the Commonwealth of Kentucky pursuant to Kentucky Revised Statute (KRS) §164.742, to Education Management Corporation and its subsidiaries, via the three Brown Mackie College facilities located within the Commonwealth, all of which are Defendants in this action (collectively "EDMC"). The Attorney General of the Commonwealth of Kentucky is responsible for the enforcement and administration of Kentucky law, including the consumer protection laws set forth in KRS Chapter 367. Though the Commonwealth of Kentucky has not adopted a state false claims act, the Kentucky Consumer Protection Act provides a state statutory cause of action through which the Kentucky Attorney

General may recover money paid by the Commonwealth as a result of an unfair, false, misleading or deceptive act or practice in the conduct of any trade or commerce. KRS § 367.170 and KRS § 367.200. KRS §367.990(2) provides civil penalties for willful violations of the Act. 31 U.S.C.A. §3732(b) authorizes this Court to exercise supplemental jurisdiction over the claims asserted in the Intervening Complaint, and conveys upon the Court subject matter jurisdiction over such claims.

The Intervening Complaint alleges that EDMC made misrepresentations to the U. S. Department of Education (“DOE”) and the Kentucky Higher Education Assistance Authority (“KHEAA”) regarding the incentive compensation provided to the Defendants’ recruiters, who EDMC refers to as Assistant Directors of Admissions. Put simply, EDMC made representations in a DOE Program Participation Agreement that they were in compliance with Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 et seq (“HEA”) and specifically § 1094(a)(20); however, the Intervening Complaint alleges that these representations were false, misleading, and deceptive. Likewise, in Administrative Agreements with KHEAA, EDMC falsely stated that it was in compliance with Title IV of HEA; compliance with Title IV of HEA is a condition to EDMC receiving student financial aid from KHEAA. As alleged in the Intervening Complaint, EDMC was not in compliance with Title IV of HEA for the same reasons giving rise to the relators’ action and the federal False Claims Act matter being asserted.

Because the state law claims asserted by the Intervening Plaintiff arise from the same transaction or occurrence as the relators’ action, and because the claims or defenses share common questions of law or fact, permissive intervention is appropriate pursuant to FRCP 24(b) and 31 U.S.C.A. § 3732(b).

II. ANALYSIS

FRCP 24(b)(1) states:

On timely motion, the court may permit anyone to intervene who:

- (A) is given a conditional right to intervene by a federal statute; or
- (B) has a claim or defense that shared with the main action a common question of law or fact.

In the present action, the Intervening Plaintiff meets both of these criteria. First, the False Claims Act, 31 U.S.C.A. § 3732(b), specifically authorizes federal district courts to exercise supplemental jurisdiction over state law claims in which a state seeks to recover funds paid by that state, provided the state law cause of action arises from the same transaction or occurrence that is at issue in the federal False Claims Act [“FCA”] case. Second, the claims in the Intervening Complaint, and the defenses thereto, share common questions of law and/or fact with the claims and defenses in the pending case. The “same transaction or occurrence” requirement stated in § 3732(b) essentially restates the “common question of law or fact” requirement listed for permissive intervention in FRCP 24(b)(1)(B); therefore, by satisfying the requirements of FRCP 24(b)(1)(A) and § 3732(b), the Intervening Plaintiff also satisfies the alternate requirement set forth in FRCP 24(b)(1)(B).

- A. Permissive Intervention Is Authorized Pursuant To FRCP 24(B)(1)(B) Because A Conditional Right To Intervene Is Stated In 31 U.S.C.A. § 3732(B).

In cases arising under the FCA, 31 U.S.C.A. § 3732(b) grants the presiding court supplemental jurisdiction over related state law claims:

Claims under state law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

31 U.S.C.A. § 3732(b). In a case related to alleged overcharges for pharmaceuticals under the Medicaid program, the U. S. District Court for the District of Massachusetts held that the legislative history of § 3732(b) supports the interpretation that § 3732(b) “should be read as an exception to the ‘general bar on intervention,’ codified at § 3730(b)(5).” *In re Pharm. Indus. Average Wholesale Price*, 509 F. Supp. 2d 82, 92-93 (D. Mass. 2007). Notably, § 3730(b)(5) provides, “When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the [federal FCA] action.”

In examining the relationship between § 3732(b) and § 3730(b)(5), the court cited S.Rep. N. 99-345, at 16 (1986) and held that, in enacting § 3732(b), Congress intended the provision to enhance the options of states, rather than to restrict them:

And finally, in response to comments from the National Association of [State] Attorneys General, the subcommittee adopted a provision allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.

In re Pharm. Indus. Average Wholesale Price, 509 F. Supp. 2d at 93. It is clear from a review of this case that the court viewed § 3732(b) as allowing state and local governments to intervene in federal FCA actions to assert state-law claims. *Id. See also, United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 880 (D.C. Cir. 1999) (“[§ 3732(b)] authorizes permissive intervention by states for recovery of state funds creating what is in effect an exception to § 3730(b)(5)'s apparent general bar on intervention by all other parties except for the United States.”).

The Western District of Pennsylvania has original jurisdiction over the federal FCA causes of action in the above-captioned case pursuant to 28 U.S.C. § 1331. This, in turn, allows the Court to exercise jurisdiction over related state law claims pursuant to 31 U.S.C.A. § 3732(b). The Intervening Complaint asserts state law claims seeking restitution of funds paid by KHEAA to EDMC via three Brown Mackie Colleges located in Kentucky. The claims in the Attorney General's Complaint in Intervention mirror those asserted in the Second Amended Complaint. A simple comparison between the Intervening Complaint and the claims raised in the present action establishes that the Intervening Plaintiff's claims arise out of the same transaction or occurrence that forms the basis of the claims and/or defenses in the above-captioned case; therefore, the Western District of Pennsylvania has the jurisdiction to hear the Intervening Plaintiff's state law claims pursuant to 31 U.S.C. § 3732(b).

- B. Permissive Intervention Is Authorized Pursuant To FRCP 24(B)(1)(B) Because The Claims In The Intervening Complaint, and the Defenses Thereto, Share Common Questions Of Law And/Or Fact With The Claims And Defenses In The Pending Action.

The "same transaction or occurrence" requirement stated in § 3732(b) essentially restates the "common question of law or fact" requirement listed for permissive intervention in FRCP 24(b)(1)(B); therefore, by satisfying the requirements of FRCP 24(b)(1)(A) and § 3732(b), the Intervening Plaintiff also satisfies the alternate requirement set forth in FRCP 24(b)(1)(B). The Intervening Plaintiff seeks permissive intervention, which is subject to the Court's discretion. In the present instance, a balancing of the equities favors granting the motion to intervene.

One principle purpose behind the enactment of FRCP 24 was to allow a party to protect itself from being excluded from an action in which it might be able to inexpensively litigate its claim. Charles Alan Wright & Mary Kay Kane, *Federal Practice Deskbook* § 80 (2009). It is in

the interests of all parties to allow the Intervening Plaintiff to intervene in the present action, as the alternative proposition would subject the Intervening Plaintiff and EDMC to the considerable burden that would arise from having to litigate a separate action in a Kentucky state court premised upon the same claims that are pending before this Court.

The principle countervailing interest discussed in published cases pertaining to permissive intervention are timeliness and whether the intervention will unduly delay or otherwise prejudice the rights of the original parties. *U. S. Postal Serv. v. Brennan*, 579 F.2d 188 (2nd Cir. 1978); *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972). The motion to intervene is timely, and is filed in accordance with a deadline set by this Court. While the Intervening Plaintiff asserts claims arising under the Kentucky Consumer Protection Act, rather than under a state False Claims Act, the Kentucky state law claims are based upon the same facts as the pending FCA claims.

In light of the applicability of 31 U.S.C. § 3732(b), supplemental jurisdiction under 28 U.S.C.A. § 1367(a) need not be independently established; however, the principles relevant under 28 U.S.C.A. § 1367(a) provide guidance as this Court considers permissive intervention. As with permissive intervention, the doctrine of supplemental jurisdiction is a doctrine of discretion, not of right. “Its justification lies in considerations of judicial economy, convenience and fairness to litigants.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). *See also, Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991) (The supplemental jurisdiction statute codified the jurisdictional standard established in *Gibbs*).

The Intervening Plaintiff asserts that the federal FCA claims in the present action are meritorious, and the facts that will be offered to establish the federal FCA claims will also satisfy his burden of proof under the Kentucky Consumer Protection Act.

III. CONCLUSION

Intervening Plaintiff should be permitted to intervene in the pending action in the Western District of Pennsylvania because 31 U.S.C. § 3732(b) grants the District Court supplemental jurisdiction to hear state law claims that arise out of the same transaction or occurrence as the federal FCA claims. Governing cases establish that 31 U.S.C. § 3732(b) creates not only jurisdiction, but also a conditional right to intervene. The Intervening Plaintiff seeks intervention in the present action because the state law claims and the pending federal FCA claims involve common questions of law and/or fact.

Because the state consumer protection claims asserted by Intervening Plaintiff, and the defenses thereto, share common questions of law and/or fact with the claims and defenses in the pending action, intervention is appropriate pursuant to FRCP 24(b) and 31 U.S.C.A. § 3732(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2011, a copy of the forgoing Memorandum in Support of the Commonwealth of Kentucky, Ex. Rel., Jack Conway, Attorney General's Motion to Intervene was filed electronically. Notice of this filing will be sent to counsel of record via the Court's CM/ECF system. Parties may access this filing through the Court's system.

/s/ Stuart W. Cobb
Stuart W. Cobb, Assistant Attorney General